

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

JUL 12 2001

JAMES W. McCORMACK, CLERK
By: [Signature] DEP. CLERK

NOBEL INSURANCE COMPANY,

PLAINTIFF

VS.

No. **5 01 - CV - 000233**

DAVID MITCHELL CONSTRUCTION, INC., This case assigned to District Judge Wilson
MIKE MITCHELL & ASSOCIATES LTD., INC. and to Magistrate Judge [Signature]
ROBERT M. MITCHELL, and LARENDA D. MITCHELL,

DEFENDANTS,

**Removed from Chancery
Court of Jefferson County;
Cause No. E-2001-861-1**

CITY OF PINE BLUFF, ARKANSAS,

SPECIAL DEFENDANT

PETITION FOR REMOVAL

To the Honorable Judges of the United States District Court for the Eastern District of Arkansas:

I.

David Mitchell Construction, Inc., Mike Mitchell & Associates Ltd., Inc., Robert M. Mitchell, and Larenda D. Mitchell are the Defendants in an action brought on June 18, 2001, in the Chancery Court of Jefferson County, entitled Nobel Insurance Company, Plaintiff against David Mitchell Construction, Inc., Mike Mitchell & Associates Ltd., Inc., Robert M. Mitchell, and Larenda D. Mitchell, Defendants, and City of Pine Bluff, Special Defendant, Cause No. E-2001-861-1. At or about the same time Plaintiff filed its Complaint in Equity and Petition for

Injunctive Relief, Plaintiff was granted an *ex parte* temporary restraining order (“TRO”) pursuant to Rule 65 of the Arkansas Rules of Civil Procedure. On or about June 20, 2001, the Chancery Court of Jefferson County entered an Order that dismissed Special Defendant, City of Pine Bluff Arkansas. A copy of the TRO (Exhibit “A”) and the Complaint (Exhibit “B”) are attached hereto and a copy of the Order for Interpleader and Dismissing Special Defendant, City of Pine Bluff, Arkansas is attached hereto as Exhibit “C” and constitutes all pleadings and any orders received by Defendants.

II.

The Summons, Complaint and TRO in this action was served on Special Defendant City of Pine Bluff on or about June 18, 2001. To date, David Mitchell Construction, Inc., Mike Mitchell & Associates Ltd., Inc., Robert M. Mitchell and Larenda D. Mitchell have not been served with process. On or about June 18, 2001, the City of Pine Bluff sent David Mitchell Construction, Inc. a facsimile copy of the Complaint and TRO that had been served on the City as Special Defendant. This notice of removal is filed within 30 days of receipt of the Complaint and is timely filed under 28 U.S.C. § 1446(b).

III.

The district courts of the United States have original jurisdiction over this action based on diversity of citizenship among the parties, in that the interested Defendants are now and were at the time the action was commenced diverse in citizenship from the Plaintiff. No interested Defendant who is a party is or was at the time the suit was commenced a citizen of the State of Arkansas. At the time the suit was commenced, the City of Pine Bluff was a Special Defendant and was never a party “in interest” within the meaning of 28 U.S.C. § 1441. See Pesch v. First City Bank of Dallas, 637 F. Supp. 1530, 1537 (N.D. Tex. 1986) (holding Texas corporation

named as defendant in state court suit did not preclude removal action to Texas federal court where Texas corporation was joined as defendant by plaintiff to prevent Texas corporation from transferring stock it held and to which adverse ownership claims were made and by plaintiff to obtain a judgment directing corporation to surrender shares). Currently, the City of Pine Bluff is no longer a party to this litigation; it deposited all funds subject to dispute into the Jefferson County Chancery Court's registry and thereby caused the Chancery Court to enter an Order that dismissed the City of Pine Bluff from the cause of action. See Exhibit C.

Nobel Insurance Company, the Plaintiff, is domiciled at 8001 LBJ Freeway, Suite 200, Dallas, TX 75251 in the State of Texas and is a wholly owned by Renaissance House, a Bermuda Company. Nobel is and was domiciled in Texas at the time this action was commenced. Plaintiff was at that time and is now a citizen of the State of Texas.

The Defendant David Mitchell Construction, Inc. is a corporation incorporated under the laws of the State of Alabama, having its principal place of business now and at the time this action was commenced at 1032 Grand Ave SW, Fort Payne, Alabama 35967. Defendant David Mitchell Construction Inc., is now and was at the time this action was commenced a citizen of the State of Alabama and of no other state.

The Defendant Mike Mitchell & Associates Ltd., Inc. was a corporation incorporated under the laws of the State of South Carolina, having its principal place of business now and at the time this action was commenced at 15525 South Boulevard, Silverhill, Alabama 36576. Defendant Mike Mitchell & Associates Ltd., Inc. is now and was at the time this action commenced a citizen of the States of South Carolina and Alabama and of no other state.

The Defendant Robert M. Mitchell is a person whose domicile is in Alabama. Defendant Robert M. Mitchell is and was at the time this action was commenced a citizen of the State of Alabama and of no other state.

The Defendant Larenda D. Mitchell is a person whose domicile is in Alabama. Defendant Larenda D. Mitchell is and was at the time this action was commenced a citizen of the State of Alabama and of no other state.

Special Defendant City of Pine Bluff is an incorporated first class municipality located in Jefferson County, Arkansas. The City of Pine Bluff is no longer a party in the litigation. On or about June 20, 2001, the City of Pine Bluff interpleaded the funds that Plaintiff seeks in its Complaint to the Jefferson County Chancery Court. See Exhibit C. That is, the City of Pine Bluff has no interest, possession or control of the money that is the subject of Plaintiff's Complaint and TRO; further, the City of Pine Bluff has asserted no rights *vis-a-vis* the money in question.

IV.

As stated in paragraphs I and III *supra*, the City's non-joinder in this Removal Petition should be excused because the City of Pine Bluff, Arkansas, has been dismissed from the cause of action. In addition, the City of Pine Bluff was never an interested party and never had any liability in this action. To the extent the City of Pine Bluff, Arkansas, is or was a party, the City is or was a nominal party because it could not be held liable for anything; it merely had funds that it did not know to whom it should direct payment. See Shaw v. Dow Brands, Inc., 994 F.2d 364, 369 (7th Cir. 1993). Assuming the City of Pine Bluff is or was a nominal party, the City need not join this Removal Petition because it has been dismissed from the case and was never

an interested party in the first place. See Grant County Sav. & Loan v. Arkansas Custom Homes, 698 F. Supp. 169, 171 (E.D.Ark. 1988)

V.

The amount in controversy in this action exceeds, exclusive of interest and costs, the sum of \$75,000. Plaintiff's Original Complaint, attached to this Petition as Exhibit B, states a claim against the Defendants in the amount of \$465,752.03.

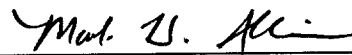
VI.

Removal of this action is proper under 28 U.S.C. § 1441, since it is a civil action brought in a state court, and the federal district courts have original jurisdiction over the subject matter under 28 U.S.C. § 1332 because the Plaintiff and Defendants in interest are diverse in citizenship.

WHEREFORE, David Mitchell Construction, Inc., Mike Mitchell & Associates Ltd., Inc., Robert M. Mitchell and Larenda D. Mitchell as Defendants, and pursuant to these statutes and in conformance with the requirements set forth in 28 U.S.C. § 1446, petitions for the removal of this action for trial from the Chancery Court of Jefferson County, Arkansas, on this 12th day of July, 2001.

HORNE, HOLLINGSWORTH & PARKER

By:


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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITION FOR REMOVAL was served on all counsel of record in accordance with the federal Rules of Civil Procedure on this the 12th day of July, 2001, as follows:

Charles S. Gibson
107 North Freeman street
Post Office Box 510
Dermott, Arkansas 71638-0510



Mark H. Allison

[7229 ON XR/XL] 61:51 JUL 10/01/20

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS
NOBEL INSURANCE COMPANY

PLAINTIFF

v.

NO. E-2001-861-1

DAVID MITCHELL CONSTRUCTION, INC.,
MIKE MITCHELL & ASSOCIATES LTD., INC.,
ROBERT M. MITCHELL, and LARENDA D. MITCHELL

DEFENDANTS

CITY OF PINE BLUFF, ARKANSAS

- SPECIAL DEFENDANT

TEMPORARY RESTRAINING ORDER

Now on this 18th day of June, 2001, Plaintiff presented its verified petition for ex parte injunctive relief, from which it is found:

1. Plaintiff has commenced this action to collect upon a foreign judgment registered in this jurisdiction against defendants upon two (2) separate theories, constructive fraud and reciprocal alter ego existing between them.
2. Plaintiff has alleged that special defendant has funds in its possession soon to be delivered to defendant, David Mitchell Construction, Inc., in the amount of \$1,860,000.00.
3. Plaintiff has alleged that an imminent risk of irreparable harm exists for which it has no remedy at law.
4. The special defendant should be ordered to withhold \$465,752.03 of said funds pending further orders of the Court, conditioned that plaintiff post a commercial surety bond in the amount of \$100,000.00. Plaintiff has posted said bond and the same is approved.

FILED

JUN 18 2001

JEANNETTE HENCE
Circuit & Chancery Clerk
JEFFERSON COUNTY, ARKANSAS

EXHIBIT
"A"

07/10/01 TUE 15:19 [TX/RX NO 6424]

IT IS SO ORDERED AND DECREED that special defendant, City of Pine Bluff, Arkansas, be and it is hereby directed to withhold the sum of \$465,752.03 from the funds in its possession claimed or owned by defendant David Mitchell Construction, Inc., pending further orders. It is further ordered that this matter be heard on _____ 2001, at _____ a.m./p.m., for a determination of whether this order should be set aside or continued in force.

Given under my hand as Chancellor this 18 day of June, 2001.


CHANCELLOR